There, the premises was clearly residential, neither the deceased tenant nor his widow had ever resided there from the commencement, and the court found as of fact that the tenant had in his lifetime abandoned the tenancy.

We therefore hold that failure to make the widow a party is fatal to the respondents' case.

Finally, our attention was drawn to that portion of the judgment in which his Lordship clearly held the view that the onus lay on the appellants to prove that the widow is alive. The fact that the widow had executed a power of attorney in India on April 4, 1973 and extracted letters of administration through her attorney on April 14, 1974 is not in doubt. The learned judge however held that this was no proof that she was still alive thereafter.

Attention of this court was obviously not drawn to the provisions of sections 107 and 108 of the Evidence Act, which are set out hereunder:

"107. When the question is whether a man is alive or dead and it is shown that he is alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

"108. When the question is whether a man is alive or dead and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden that he is alive is shifted to the person who affirms it."

It was certainly not part of respondent/plaintiff's case that the widow was dead at material times, and indeed if he had, the burden would be upon him to prove her death.

Therefore on the pleadings, the appellants are entitled to succeed, for under section 16(2), "the tenant or a member of his family shall be deemed to have occupied business premises so long as he uses such premises for his business or trade, notwithstanding that such ... member of his family does not reside therein."

The appellants could therefore in no sense be termed trespassers.

We would therefore allow the appeal with costs.

Appeal allowed.

Solicitors: *N. Ramachandran & Co.; Gill & Tang.*

AMOS WILLIAM DAWE v. DEVELOPMENT & COMMERCIAL BANK (LTD.) BERHAD

[F.C. (Raja Azlan Shah C.J. (Malaya), Wan Suleiman & Chang Min Tat F.JJ.) November 19 & December 17, 1980]

[Kuala Lumpur — Federal Court Civil Appeal No. 149 of 1979]

Practice and Procedure — Appellant adjudicated a bankrupt in Singapore — Reciprocal arrangements with Singapore — Application to strike out appeal — Application by appellant to adduce further evidence and for leave to file counterclaim — Pleadings — Costs — Bankruptcy Act, 1967, ss. 8 & 104.

Bankruptcy — Appellant adjudicated a bankrupt in Singapore — Reciprocal arrangements with Singapore — Bankruptcy Act, 1967, ss. 8 & 104.

Costs — Bankrupt client — Proceedings begun notwithstanding — Solicitors personally liable for costs.

The respondent bank had claimed the sum of $600,000 in respect of a continuing guarantee and indemnity given by the appellant for the grant of banking facilities to a company. The defence of the appellant was a total denial of any knowledge of the indemnity or the advance to the company. The respondents applied for the defence to be struck out and for leave to sign final judgment. This was granted and the appellant appealed. The appellant applied to adduce further evidence and for leave to file a counterclaim. The application was supported by an affidavit in which the appellant contended that the guarantee was for $500,000 only, that it was to be joint and several with others and that the Bank was in breach of a promise to buy certain shares from him. It transpired that the appellant had been adjudicated a bankrupt by the High Court in Singapore prior to the filing of the action.

Held: (1) as the appellant had been adjudicated a bankrupt in Singapore, the appeal must be struck out and the judgment of the High Court in the action set aside;

(2) as the appellant had not sought to amend his defence, the Court could not in the circumstances consider any affidavit by the appellant which not only purportedly raised issues of fact not averred to in the pleadings but which also flatly contradicted his own pleadings. No order would therefore be made on the motion to adduce further evidence;

(3) in this case there was no action in existence to which the counterclaim can be made and moreover the appellant had been adjudicated a bankrupt and could not pursue the claim;

(4) in the circumstances the costs of the proceedings after the fact of the bankruptcy became known to the solicitors for the appellant, should be borne by the solicitors personally.

Cases referred to:-

(1) *C.S.I. International Co. Ltd.* v. *Archway Personnel (Middle East) Ltd.* [1980] 1 W.L.R. 1069; [1980] 3 All E.R. 215.

(2) *Ladd* v. *Marshall* [1954] 1 W.L.R. 1489.

(3) *Chai Yen* v. *Bank of America National Trust and Savings Association* [1980] 2 M.L.J. 142.

FEDERAL COURT.

R. Padmanabhan for the appellant.

T. Thomas for the respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): We have before us two motions. The first in time is by the respondent to strike out the appeal on the grounds of the appellant's incompetency personally to lodge and prosecute any appeal or any action after he had been adjudicated a bankrupt and a receiving order made against him. The second is by the appellant to adduce further evidence.

The background to the case is as follows: The respondent Bank had in the action claimed from the appellant $600,000 in respect of a continuing guarantee and indemnity given by the appellant for the grant of banking facilities to Han City Textiles Industries Bhd. (the company) and interest. The advance to the company is in excess of $1½ millions, but the claim against the guarantor is limited to the amount in the guarantee. The facts of the claim are simple and uncomplicated, the cause of action is clear and the indorsement of the statement of claim in the specially indorsed writ of summons does not need to be of any length or intricacy. But the defence, such as it is, is of equal brevity. It is a total denial of any knowledge of the indemnity or the advance to the company, though it admits the demand made on the appellant. It must be presumed that the defence was drafted on the appellant's instructions.

The defence does not descend to any particulars and clearly so trangresses the basic rules of pleadings that it invited an application which was duly made, to strike out the defence as disclosing no defence to the claim and for liberty to sign final judgment. At that application, the copy of the indemnity with the Bank was produced. It clearly bore the signature of the appellant, and the attestation thereof by a solicitor. Counsel appeared for the appellant. Claiming to have received no instructions, he asked for an adjournment. It was refused. An order in terms was made.

In support of his application to adduce further evidence, the appellant filed a lengthy affidavit and exhibited thereto certain documents. It clearly refutes his entire defence that he had no knowledge of the indemnity. It raises three contentions, which briefly are that the guarantee was to be for $500,000 only and not $600,000, it was to be joint and several with others and the Bank was in breach of a promise to buy certain shares from him. On the third contention, it prayed for leave also to file a counterclaim.

Insofar as the counterclaim is concerned, no such claim has been formulated. In *C.S.I. International Co. Ltd.* v. *Archway Personnel (Middle East) Ltd.*[1] it was held that where a judgment had been obtained and satisfied, there is no action in existence in which the counterclaim can be made. Even if the appellant is able to distinguish his case, he has another difficulty to overcome, relating to his status as a litigant.

Any application to adduce further evidence must be grounded on the three well-known conditions so clearly set out, *inter alia*, in *Ladd* v. *Marshall.*[2] The courts of this country have consistently followed this case, the latest occasion being in *Chai Yen* v. *Bank of America National Trust and Savings Association.*[3] The appellant was not unaware of the conditions he had to satisfy for his application and he grounded his application on precisely these three conditions. It was all very curious. It was his serious contention that the evidence which he sought to introduce could not have been obtained with reasonable diligence at the hearing of the application to strike out the defence and to enter final judgment, that the evidence would probably have an important influence on the result of the hearing and that it was credible. But if it was not with tongue in cheek, neither the appellant nor, with respect, his legal advisers appeared to realise that this and any other evidence should in the first place have been averred to in the statement of defence since it is there that the court must consider whether the defence discloses any answer to the claim on the continuing guarantee and indemnity, and on that consideration come to a decision whether to strike out the defence or not. The obvious course for the appellant to adopt was clearly to amend his defence but at all times he had failed to do so. If the defence remained unaltered and as it stood, consisting entirely of a bare denial of having given the continuing guarantee and indemnity, the court could not in the circumstances have considered any affidavit by the appellant, even if filed within time, which not only purportedly raised issues of facts not averred to in the pleadings but which also flatly contradicted his own pleadings.

It is also clear, from the contents of the appellant's own affidavit and that of his solicitors in America where he is presently residing that he would not be able to respond to any order reasonably to be made by the court to allow cross-examination of him on his affidavit. The appellant has applied for "political asylum" in the U.S.A. He has been advised that if he should leave the shores of the U.S.A., he might not be allowed re-entry to rejoin his wife and children. Even if the request for political asylum is not a cover for his past activities in the commercial and financial world of Singapore, it does raise questions as to his future status should he return to Singapore or come to Malaysia.

But there is an even greater complication. It now transpires that the appellant was adjudicated a bankrupt by the High Court in Singapore on October 27, 1978, that is, on a date anterior even to the filing of the action, which was on January 3, 1979. The fact of the appellant's bankruptcy was discovered by the solicitors for the respondent on August 16, 1979 after judgment was entered on June 18, and when the respondent was preparing to proceed in bankruptcy. But apparently, the appellant did not advise his first solicitors of this fact and the evidence before this court is that his present (substituted) solicitors only met with the Official Assignee of Singapore on September 12, 1980. This date must therefore be taken, unless shown to be otherwise, as the earliest date to fasten them with such knowledge.

Section 104 of the Bankruptcy Act 1967 (No. 55 of 1967) provides for reciprocal provisions between Singapore and Malaysia in all matters of bankruptcy and insolvency. By subsection (3) the Yang di-Pertuan Agong by notification in the Government *Gazette* may declare that the Government of the Federation has entered into an agreement with the Government of the Republic of Singapore for the recognition by each of such Governments of the Official Assignees in Bankruptcy appointed by the other Government. No such notification has been made, but there is one, L.N. 37A of 1950 with effect from February 1, 1950 in respect of the Bankruptcy (Transitional Provisions) Ordinance 1946 and the Transfer of Powers Ordinance 1948. It is not argued, least of all by the appellant, that the operation of this notification does not extend to the present Act.

In view of this turn of events, the solicitors for the respondent Bank frankly and without reservation concede that the judgment obtained by them is of no effect and they therefore propose to prove their client's claim in the bankruptcy of the appellant. But they have to bring the notice of the appellant's bankruptcy to the attention of the court and in view of the application by the appellant made without the slightest disclosure of the state of his affairs by his solicitors, they could only do so by an application to strike out the appeal. In sharp contrast, the appellant's solicitors made the application to adduce this further evidence on October 17, 1980 after they have become aware of the adjudicating and receiving orders made

against their client, after they have met with the Official Assignee of Singapore on September 12, 1980 and before obtaining the leave of the Official Assignee as required by section 8 of the Bankruptcy Act. And they persist with their application, after permission had been refused, up to the hearing in this court.

In these circumstances, we make no order on the motion to adduce further evidence but order that the costs of all proceedings therein after September 12, 1980, be borne personally by the solicitors; we allow the respondent's motion to strike out the appeal with costs and we set aside the judgment of the High Court in the action.

Order accordingly.

Solicitors: *K.C. Koh & Co.; Skrine & Co.*

TARA RAJARATNAM v. DATUK JAGINDER SINGH & ORS.

[F.C. (Wan Suleiman F.J., Ibrahim Manan F.J. & Hashim Yeop A. Sani J.) July 9 & December 18, 1980]
[Kuala Lumpur — Federal Court Civil Appeal No. 201 of 1979]

Practice and Procedure — Res Judicata — Orders granting appellant liberty to file a fresh action — No final decision made — Plea of res judicata must fail — R.S.C. 1957, O. 19 r. 15.

The appellant had brought an action in which she prayed for a declaration that the transfers relating to land of which she was the registered proprietress was null and void. She alleged undue influence and breach of trust and fraud. The respondents applied by summons in chambers to have the appellant's claim dismissed on the ground that the matter was *res judicata* as it was alleged that the issues had been determined and adjudicated upon in a previous action between the parties. It appeared that the appellant had filed an earlier suit but on application by the respondents the indorsement to the writ and the statement of claim were ordered to be struck out but liberty was given to the plaintiff to file a fresh action. The learned trial judge allowed the application of the respondents and dismissed the action on the ground of *res judicata*. The appellant appealed.

Held: the orders in the earlier case in granting the appelland liberty to file a fresh action showed that no final decision had been pronounced so as to estop the appellant in a subsequent litigation from disputing or questioning such decision on the merits. Therefore the plea of *res judicata* must fail.

Cases referred to:-

(1) *Republic of Peru* v. *Peruvian Guana Co.* (1887) 36 Ch. D. 489, 496.
(2) *Carl-Zeiss-Stiftung* v. *Rayner and Keeler Ltd. & Ors. (No. 2)* [1966] 2 All E.R. 536, 564.
(3) *Andavan* v. *Thong Nyik Lin* [1966] 1 M.L.J. 57.
(4) *Parsotam Gir* v. *Narbada Gir* (1898-99) L.R. 26 I.A. 175.
(5) *Pople* v. *Evans* [1968] 2 All E.R. 743.
(6) *McIlkenny* v. *Chief Constable of the West Midlands & Anor.* [1980] 2 W.L.R. 689.

[The following cases were also cited in argument: *Kok Hoong* v. *Leong Cheong Kweng Mines Ltd.* [1964] M.L.J. 49; *Tong Lee Hwa* v. *Lee Yoke San* [1979] 1 M.L.J. 24; *Jenkins* v. *Robertson* (1867) L.R. 1 H.L. Sc. App. 117, 122; *Sheodan Singh* v. *Daryas Kunwar* A.I.R. 1966 S.C. 1332; *Lee Sem Yoong* v. *Leong Yoong* [1967] 2 M.L.J. 86; *Saminathan* v. *Palaniappa* [1914] A.C. 618; *Abdullah Ashgar* v. *Ganesh Dass* A.I.R. 1917 P.C. 201; *Hunt* v. *Allied Bakers* [1956] 1 W.L.R. 1326; *Deviditta* v. *Nathu* (1912) 15 I.C. 930.]

FEDERAL COURT.

P. Cumaraswamy (*C.D. Das* and *Subranaicker* with him) for the appellant.

Ronald Khoo for the 1st & 3rd respondents.

2nd respondent in person (*qua* litigant).

Cur. Adv. Vult.

Wan Suleiman F.J. (delivering the judgment of the Court): The appellant was the plaintiff in the High Court Johore Bahru Civil Suit No. 284 of 1979.

Her statement of claim is briefly this:

That prior to July 22, 1975 she was the registered proprietress of a piece of land held under C.T. No. 13817 Lot No. 6025 in Mukim Senai-Kulai, District of Johore Bahru, that she had entered into an arrangement with the 2nd respondent to transfer the land to him as security for a loan of $220,000 from him, that prior to executing a written memorandum and blank undated transfer and other related forms, there was an oral agreement relating to retransfer to appellant on repayment of that sum, that without her knowledge or consent, the first and second defendants caused 2nd defendant to be registered as proprietor, and shortly thereafter transferred the property to 3rd defendant after which they had ejected her from the property.

Appellant alleged undue influence and breach of trust by the first and second defendants, and fraud against all three.

She then prayed for a declaration that these transfers were null and void, that the 2nd, 3rd defendants and successive registered owners held and dealt with it as trustees and for her benefit, and for certain ancillary orders and declaration.

The respondents applied by way of summons-in-chambers to have the appellant's claim dismissed on the ground that the matter is *res judicata*, the issues, it was alleged having been determined and adjudicated upon in a previous action between the parties. The appellant objected on the ground that there was no provision in the Rules of the Supreme Court for this plea to be brought in this manner, but was promptly overruled by the learned judge. Since the objection was not repeated before us, possibly because counsel for the appellant was not taken by surprise in the court below, we need only remark that the proper course where a party claims that he is being vexed twice for the same cause is to plead this — see Order 19 rule 15 and the notes on *Res Judicata* in *Mallal's* Supreme Court Practice at page 261.

After hearing arguments from both sides, the learned judge allowed respondents' application, or in other words found that the doctrine had correctly been invoked and dismissed the action with costs.

The amended statement of claim in Civil Suit 261 of 1977 shows that the parties are identical, and the cause of action over the same piece of land, the same as that in Civil Suit 284 of 1979, and the substance of the prayers the same.